Supreme Court
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No. 00-1022

In The

Supreme Court of the United States

INTERACTIVE FLIGHT TECHNOLOGIES, INC.,

Petitioner,

v.

SWISSAIR SWISS AIR TRANSPORT COMPANY, LTD., SR TECHNICS, LTD., and SAIR GROUP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

GEORGE H. MITCHELL
(Counsel of Record)
SCOTT A. SALMON
CHRISTOPHER ROBBINS
KERRY M. GRIGGS
Attorneys for Respondent

THE CAVANAGH LAW FIRM, P.A.
1850 North Central Avenue, Suite 2400
Phoenix, Arizona 85004
602-322-4000
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

Swissair Swiss Air Transport Company, Ltd. is a shareholder company under Swiss law. Its only nonwholly-owned subsidiary is Swissair Flight Support, Ltd. SR Technics, Ltd. is a shareholder company under Swiss law and was originally known as Swissair Technical Services Ltd. Its nonwholly-owned subsidiaries are SR Technics France Inc., SAL Shannon Aerospace Ltd., TEMRO AG, Pacific Gas Turbine Center LLC (USA), Flight Technics LLC (USA), and WLFC Willies Lease Finance Corporation (USA). SAirGroup is the holding company, and was dismissed from this action via stipulated order of the district court on October 27, 1999. Response, A1-A2.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 5

CONCLUSION 7

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Cook v. Erby, 207 F.3d 1104 (9th Cir. 2000) 4

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 7

Green Tree Fin. Corp. – Alabama v. Randolph, 531 U.S. ___, 69 U.S.L.W. 4023, 2000 U.S. LEXIS 8279 (Dec. 11, 2000; No. 99-1235) 4, 5, 6, 7

Jung v. K. & D. Mining Co., 356 U.S. 335 (1958) 5

McCarthy v. Providential Corp., 122 F.3d 1242 (9th Cir. 1997) 4, 5, 7

Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1 (1983) 7

Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423 (9th Cir. 1984) 6

STATUTES AND COURT RULES

Federal Arbitration Act

9 U.S.C. §§ 1-14 3

9 U.S.C. § 16 ..... 4, 6

The Convention on Recognition and Enforcement of Foreign Arbitral Awards

9 U.S.C. §§ 201-208 3

Federal Rules of Civil Procedure

Fed. R. Civ. P. 58 5

STATEMENT OF THE CASE

This lawsuit arises out of a commercial contractual relationship between Interactive Flight Technologies, Inc. ("IFT") and Swissair Swiss Air Transport Company, Ltd. ("Swissair"). The dispute involves the installation and operation of IFT's In-Flight Entertainment Systems ("IFEN Systems") on a number of Swissair aircraft.

The relevant relationship between IFT and Swissair is governed exclusively by a fully-integrated written contract titled "IFEN-2 Sales and Services Agreement," dated October 29, 1997. This 1997 agreement sets forth the parties' rights and obligations concerning the IFEN Systems, including their continued operation after installation.

The agreement also contains broad arbitration provisions, requiring the arbitration of "all disputes arising out of, in connection with or relating to" the agreement, "including any subsequent amendment thereof." It requires the submission of all such disputes to a Swiss arbitration tribunal, "to the exclusion of the ordinary courts."

After the crash of Swissair Flight 111 near Peggy's Cove, Nova Scotia, on September 2, 1998, the Swiss Federal Office of Civil Aviation ("FOCA") decertified and demanded deactivation of the IFEN Systems in Swissair's aircraft. This formal action, taken on November 13, 1998, was due to a potential link between the IFEN Systems and the crash. Based on indications from the accident investigation that the IFEN System could not be excluded as a possible source of the fire which had broken out on board Flight 111, Swissair had determined a few days earlier that deactivation was appropriate under the circumstances.

IFT sued Swissair in federal district court in Arizona on May 6, 1999, alleging breach of contract, promissory estoppel, and breach of the implied covenant of good faith and fair dealing. To avoid the application of the arbitration provisions of the 1997 agreement, IFT focused primarily on a number of letters and e-mails that were exchanged between the parties in late 1997 and early 1998 that IFT claimed constituted a separate contract, without an arbitration clause.

The letters and e-mails dealt with proposals to equip additional aircraft with IFEN Systems and to extend warranties on existing systems. In this correspondence, Swissair representatives indicated that, to be finalized, the substance of IFT's proposals would require the formal amendment of the 1997 agreement. A proposed amendment was ultimately drafted, but never executed by Swissair.

In its complaint, IFT also named SR Technics, Ltd. ("SR Technics") as a defendant, apparently on the theory that SR Technics should be considered a party to the alleged separate contract formed by the letters and e-mails. In reality, SR Technics' involvement with the IFEN Systems was limited to monitoring their installation and, later, maintenance.

SR Technics was not a party to the 1997 agreement, nor was SR Technics a party to any contract requiring payment of any sum of money to IFT. Indeed, the only contract between SR Technics and IFT involved SR Technics' agreement to act as IFT's subcontractor for purposes of providing appropriate facilities and assisting in the maintenance of the IFEN Systems on Swissair aircraft.

This contract became effective on August 1, 1997 and contains arbitration provisions nearly identical to those in the 1997 agreement between IFT and Swissair.

Swissair moved to dismiss IFT's complaint, based primarily on the Federal Arbitration Act, 9 U.S.C. §§ 1-14, and The Convention on Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208. The district court treated this as a motion to compel arbitration and held in favor of Swissair. The court determined that the entirety of IFT's claims against Swissair were governed by the 1997 agreement and that the letters and e-mails claimed to be a separate contract were simply negotiations toward an ultimate proposed formal amendment to the existing agreement. Petition, A8. In concluding that dismissal of IFT's complaint was appropriate as to Swissair, the district court held:

> Section 3 of the Federal Arbitration Act provides that the court stay an action pending arbitration, but the Ninth Circuit as well as other circuits have recognized that it is within the court's discretion to dismiss an action if the arbitration clause is broad enough to bar all of the plaintiff's claims because it required the plaintiff to submit all its claims to arbitration. . . . Because all of plaintiff's claims against Swissair must be submitted to arbitration, the court, in its discretion, dismisses plaintiff's complaint against Swissair.

Petition, A11. This dismissal was without prejudice. Petition, A14.

SR Technics also moved to dismiss IFT's complaint, relying, in part, on the same arbitration statutes. The

court treated the relief requested as a motion to compel arbitration and held in SR Technics' favor. In so doing, the court found that SR Technics was not a party to the agreement between IFT and Swissair. Petition, A13. It also found that the only agreement between IFT and SR Technics contained arbitration provisions nearly identical to those of the 1997 agreement between IFT and Swissair. *Id.* Accordingly, in the court's discretion, it dismissed IFT's complaint without prejudice as to SR Technics.

IFT appealed to the Ninth Circuit Court of Appeals, after which Swissair and SR Technics moved to dismiss the appeal based upon 9 U.S.C. § 16, which generally disallows immediate appeals from district court orders finding in favor of arbitration. The court granted this motion, citing *Cook v. Erby*, 207 F.3d 1104, 1106-07 (9th Cir. 2000), and *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997), two cases that rely, in part, on the distinction between "independent" and "embedded" claims for purposes of determining whether a litigant may immediately appeal a district court's order in favor of arbitration under the Federal Arbitration Act.[1] Petition, A1.

Nearly three months after the dismissal of IFT's appeal, this Court issued its decision in *Green Tree Fin.*

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[1] Under this approach, an arbitration claim that is the only issue before a district court is said to be "independent" and may result in a district court order that is immediately appealable. *McCarthy*, 122 F.3d at 1244. This is in contrast to an arbitration claim that is "embedded" within an action seeking substantive relief, which may not result in an immediately-appealable order. *Id.*

Corp. – Alabama v. Randolph, 531 U.S. ___, 69 U.S.L.W. 4023, 2000 U.S. LEXIS 8279 (Dec. 11, 2000; No. 99-1235), wherein the embedded/independent distinction was disapproved. IFT thereafter filed the present petition.

ARGUMENT

This Court's opinion in *Green Tree* does not impact the Ninth Circuit Court of Appeal's dismissal of the appeal in this case. While it is true that this Court partially disapproved of *McCarthy*, 122 F.3d at 1242, and a number of other cases that employ the embedded/independent distinction, *Green Tree*, 2000 U.S. LEXIS 8279 at *15 n.3, this is not the end of the inquiry, particularly since *Green Tree* involved a dismissal with prejudice and the present case involves a dismissal without prejudice. The *Green Tree* opinion did not address this significant distinction, nor did it feel compelled to dig deeper into the facts and ultimate holdings of the partially-disapproved cases, some of which involved dismissals with prejudice, and some of which involved dismissals without prejudice. Instead, the Court focused solely on the embedded/independent distinction and rendered no opinion concerning other potential bases for upholding the dismissals in the specifically-referenced cases. In truth, those cases involving dismissals without prejudice stand on their own, regardless of whether the embedded/independent distinction played any part in the respective courts' analyses. See generally *Jung v. K. & D. Mining Co.*, 356 U.S. 335, 336-37 (1958) (holding, pursuant to Fed. R. Civ. P. 58, that a district court's dismissal that does not direct "that all relief be denied" is not a final, appealable

judgment); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1432 (9th Cir. 1984) ("A dismissal without prejudice opens the door to a renewed contest. A dismissal with prejudice brings the contest to a close.") (*partially superseded by statute on other grounds*, as stated in *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1392 n.3 (9th Cir. 1988)).

The *Green Tree* opinion itself appears to account for this dynamic, since the underlying dismissal with prejudice is what allowed this Court to conclude that the district court had issued a "final decision" that ended the litigation "on the merits" and left "nothing more for the court to do but execute the judgment." *Green Tree*, 2000 U.S. LEXIS 8279 at *13 (citations omitted). It is no mystery that such a decision may be subject to immediate appeal. *Id.* at *16. The same cannot be said about the district court's order in the present matter, which, by its very nature, is not final and did not even purport to address the "merits" of IFT's claims. Petition, A11. Indeed, under the circumstances of this case, the district court's dismissal without prejudice should be considered as the equivalent of a stay pending arbitration, an action that this Court has expressly recognized is not subject to immediate appeal under 9 U.S.C. § 16(b)(1). *Green Tree*, 2000 U.S. LEXIS 8279 at *14 n.1.

At the same time, the *Green Tree* opinion does not foreclose upon a district court's obligation to exercise discretion in fashioning orders in favor of arbitration. *Id.* (noting that the Court was not addressing whether the district court should have entered a stay instead of dismissal). As such, a district court, familiar with the issues and facts of a given suit, should still be able to dismiss

matters without prejudice so that arbitration may take place with the least possible burden on the parties and the court's docket. *McCarthy*, 122 F.3d at 1245 ("We stress again that we are not precluding review of the district court's order compelling arbitration; we are merely postponing it until the arbitration proceeding has run its course.").

In fact, as the district court held in this case, dismissals without prejudice are particularly appropriate when the parties' entire dispute is subject to arbitration and nothing would be gained by granting a stay. Petition, A11. Such a result works to advance the strong federal policy in favor of arbitration over litigation. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991) (noting that the Federal Arbitration Act manifests a "liberal federal policy favoring arbitration agreements"); *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983) ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). It would, therefore, be inappropriate for this Court, or any court, to further address this case until after the parties have complied with their voluntarily-contracted arbitration procedure.

CONCLUSION

In view of the foregoing, the Court's recent decision in *Green Tree* has no meaningful impact on the current dispute. Swissair and SR Technics, therefore, respectfully urge the Court to deny IFT's petition and to take no

action with respect to the Ninth Circuit Court of Appeals' dismissal of IFT's appeal.

GEORGE H. MITCHELL
(Counsel of Record)
SCOTT A. SALMON
CHRISTOPHER ROBBINS
KERRY M. GRIGGS
Attorneys for Respondent
THE CAVANAGH LAW FIRM, P.A.
1850 North Central Avenue,
Suite 2400
Phoenix, Arizona 85004
602-322-4000
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

INTERACTIVE FLIGHT TECHNOLOGIES, INC., Plaintiff, v. SWISSAIR SWISS AIR TRANSPORT COMPANY, LTD., SR TECHNICS, LTD., SAIR GROUP, Defendants.	NO. CIV 99-0836 PHX SMM **ORDER ON STIPULATION RE: DISCOVERY; DISMISSAL OF SAIR GROUP; AND WITHDRAWAL OF PERSONAL JURISDICTION DEFENSE AS TO SWISSAIR** (Filed Oct. 27, 1999)

Pursuant to the Stipulation Re: Discovery; Dismissal of SAirGroup; and Withdrawal of Personal Jurisdiction Defense as to Swissair filed herein, and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. That, solely for purposes of the allegations arising out of the subject-matter of the Complaint filed by Plaintiff Interactive Flight Technologies, Inc. ("IFT"), Defendant SAirGroup is not subject to personal jurisdiction in the State of Arizona;

2. That SAirGroup is hereby dismissed from this action, without prejudice;

3. That the pending Motion to Dismiss as to SAirGroup has hereby become moot and is, therefore, withdrawn;

4. That, solely for purposes of the allegations arising out of the subject-matter of IFT's Complaint; Defendant Swissair, Swiss Air Transport Company, Ltd., ("Swissair") has voluntarily withdrawn its defense of personal jurisdiction, submitting itself to the personal jurisdiction of this Court for the limited purpose set forth above;

5. That the parties shall not engage in any formal discovery, whether through written, oral, or other means, concerning the remaining issues addressed in the two outstanding Motions to Dismiss currently pending before the Court until after the Court has issued a ruling on said issues;

6. That Plaintiff's Request for Production of Documents addressed to all Defendants – Set 1, dated 9/22/99, and the Notices of Deposition of Hans Peter Berchtold, Karl Laasner, Fred Maegli, Benjamin H. Sterchi, Philippe Bruggisser, and Jeffrey G. Katz, all dated 9/22/99, are withdrawn; and

7. That IFT shall submit its Responses to the two outstanding Motions within the timeframe agreed upon

in the parties' Joint Motion to Extend Time, filed on or about August 27, 1999.

/s/ Stephen M. McNamee
The Honorable Stephen M. McNamee
Judge of the United States District Court